No. 10938

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

THE FRANKLIN FIRE INSURANCE CO. OF PHILADELPHIA, PENNSYLVANIA, a corporation,
Appellant,

vs.

OLUF B. HANNEY, HANS MIKELSEN and PAUL VOHL,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

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JURISDICTION

Jurisdiction of the trial court in this cause is based upon U.S.C. Title 28, sec. 41(1) conferring upon federal district courts original jurisdiction of all suits of a civil nature where the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00 and is between citizens of different states. In this cause by the Amended Complaint the plaintiffs, citizens and residents of the State of Washington, sued the defendant, a citizen and resident of the State of Pennsylvania, to recover $14,160.14, for all

of which the defendant denied liability by its Second Amended Answer (R. 2, 8, 39).

Jurisdiction of the appellate court in this cause is based upon U.S.C. Title 28, sec. 225, authorizing an appeal to a United States Circuit Court of Appeals from final decision in a federal district court, and upon U.S.C. Title 28, sec. 230, requiring such an appeal to be taken within three months after entry of judgment. In this cause the order of the trial court (R. 41, 42) denying the defendant's Motion for Summary Judgment, became a final decision when judgment against the defendant was entered on November 10, 1944 (R. 121). Notice of appeal and supersedeas bond were duly filed on November 16, 1944 (R. 122-124; F.R.C.P. Rule 73).

STATEMENT OF THE CASE

This cause has developed two appeals—the present by the defendant; and a former by the plaintiffs, identified in this court as No. 10647.

The plaintiffs' Amended Complaint contained two counts.

The first count asserted a claim for recovery for personal property lost by fire while in storage at Seattle against the defendant upon its Builders' Risk Policy of insurance covering the construction of a vessel at Tacoma (R. 2). The second count asserted a claim for recovery for the same loss upon the same policy—not as written and issued—but as to be reformed to cover personal property at Seattle (R. 6).

As to the first count of the Amended Complaint based upon the policy, the defendant's Motion to Dismiss for failure to state a claim was granted by the lower court (No. 10647; R. 32-35); and the plaintiffs took the former appeal (No. 10647; R. 35).

As to the second count of the Amended Complaint based upon reformation, incidental to the former appeal it was eliminated from the case by plaintiffs' election and waiver upon which the lower court entered a consent order of dismissal (R. 25, 26).

Concluding the former appeal and reversing the lower court's dismissal of the first count, this court rendered an opinion ruling that the language of the Builders' Risk Policy (standing alone) left the scope of its coverage over plaintiffs' property lost at Seattle "in considerable obscurity." However, this court also said: "We have no settled view concerning the extent

of the coverage afforded by this policy, and we desire not to be understood as expressing any" (Opinion No. 10647 filed May 24, 1944; reported 142 F.(2d) 864).

After remand to the lower court the "further proceedings" included the following:

(1) The defendant took the deposition of Stakset solely as to the amount of plaintiffs' loss or damages (R. 43-89);

(2) The *plaintiffs* took the deposition of Wheelock, a Seattle insurance agent, as to the coverage of the defendant's Builders' Risk Policy obtained through him (R. 89-119);

(3) The defendant filed its "Request for Admissions under Rule 36," incorporating therein "*Agreement*" (dated May 14, 1941, between Hanney, one of the plaintiffs, and Petersen, a builder) *for the construction of the vessel to be "known and designated as Hull No. 20,"* which was insured by the Builders' Risk Policy in suit (R. 26-35);

(4) The plaintiffs filed their "Response to Request for Admissions under Rule 36" (R. 35-37);

(5) The defendant filed its "Second Amended Answer to Plaintiffs' Amended Complaint"—with plaintiffs' written permission (R. 38, 39);

(6) The defendant filed its "Motion for Summary Judgment under Rule 56" (R. 39, 40);

(7) With plaintiffs' consent (R. 41) and *before* the trial (R. 42), the defendant's Motion for Summary Judgment was presented upon the record as then existing (R. 41). After argument the motion

was denied by oral ruling and formal order on October 31, 1944 (R. 41, 42);

(8) A jury trial followed, which was concluded by a verdict for plaintiffs in the sum of $7,200.00, upon which a judgment was entered against the defendant, with allowance of costs and interest at six per cent from the date of the loss on February 24, 1942, until the date of final payment (R. 120, 121);

(9) The defendant promptly instituted the present appeal (R. 122-124).

STATEMENT OF POINTS

With its Notice of Appeal and Supersedeas Bond the defendant on November 16, 1944, filed "Statement of Points on which Appellant Intends to Rely on Appeal" (R. 125), specifying the following:

(1) That the District Court erred by failure and refusal to grant before and without trial the defendant's motion for summary judgment under Rule 56, argued and submitted on October 31, 1944;

(2) That the District Court erred by entering order denying the defendant's motion for summary judgment under Rule 56 on October 31, 1944;

(3) That the District Court erred by entering final judgment on November 10, 1944, in favor of the plaintiffs and against the defendant, because the latter continued entitled to summary judgment in its favor without trial upon its said motion under Rule 56 as of October 31, 1944;

(4) That the District Court erred in the final judgment entered on November 10, 1944, by al-

lowing interest upon the plaintiffs' unliquidated demand from February 24, 1942, the date of the loss, rather than from November 10, 1944, the date of said judgment.

After the present appeal was docketed in this court the defendant adopted and reiterated, without change or addition, the above "Statement of Points" as filed in the lower court (R. 130). The defendant has never assigned error or taken appeal from any trial proceeding or ruling.

QUESTIONS INVOLVED

A. The *major* problem for solution on the present appeal is whether the defendant's motion for summary judgment of dismissal should have been granted before trial.

This major problem divides itself into two questions:

(1) Whether, considering "the pleadings, depositions and admissions on file" when the motion for summary judgment was determined, there was "no genuine issue as to any material fact," except only "as to the amount of damages" —a procedural question of law arising from the language of F.R.C.P. Rule 56;

(2) Whether the Builders' Risk Policy in suit clearly negatived insurance covering plaintiffs' loss in Seattle when the policy was explained and its subject matter identified of record by the agreement for the construction of "Hull No. 20" at Tacoma—a substantive question of law arising from the merits of the litigation.

B. The *minor* problem for decision on the present

appeal (to be examined only if the lower court be otherwise affirmed) is whether the judgment below should have allowed interest from the date of the loss when the amount thereof was unliquidated and disputed.

C. From the defendant's point of view the present appeal involves no question of fact.

ARGUMENT

1. No Factual Issue.

It is the defendant's contention (when its motion for summary judgment was submitted) "that, except as to the amount of damages, there was no genuine issue as to any material fact" appearing of record as it then existed in this case.

Rule 56 of the Federal Rules of Civil Procedure, so far as material, provides:

> Rule 56(b) "A party against whom a claim * * * is asserted * * * may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."
>
> Rule 56(c) "* * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The motion for summary judgment read as follows:

> "Comes now the defendant and moves for summary judgment dismissing the above entitled action with prejudice and with costs and dis-

bursements to be taxed in favor of the defendant and against the plaintiffs upon the ground that there is no genuine issue as to any material fact (except as to the amount of damages) and that the defendant is entitled to such judgment as a matter of law.

"This motion is based upon the record herein including the first cause of action in the plaintiffs' amended complaint, the second amended answer of the defendant, the depositions, the defendant's 'Request for Admissions under Rule 36' and the plaintiffs' 'Statement in Response to Request for Admissions under Rule 36'." (R. 39, 40)

As recited by the motion, it was technically based on the record then existing, which comprised:

(a) The first count of plaintiffs' amended complaint, (R. 2-6);

(b) The defendant's request for admissions under Rule 36, (R. 26-35);

(c) The plaintiffs' responsive admissions under Rule 36, (R. 35-37);

(d) The defendant's second amended answer, (R. 38, 39);

(e) The two depositions, (R. 43-119).

The first count of the plaintiffs' amended complaint (R. 2-6) in substance alleged:

In Article I that the plaintiffs and the defendant were citizens of different states, and that the amount in controversy exceeded $3000;

In Article II that on August 20, 1941, the plaintiffs were the owners of a boat then being built at Brown's Point, Tacoma, called *"Hull No. 20"*; that the plaintiffs "desiring to effect insurance" on *"Hull No. 20"* and upon all mate-

rials, etc., acquired and accumulated for her construction and upon all apparel, etc., belonging to and destined for said "Hull No. 20," the defendant for a certain premium on August 20, 1941, at Seattle issued a policy of insurance, copy being attached as Exhibit A (R. 10-22);

In Article III that the term of the policy was extended in time beyond February 24, 1942, when it continued effective;

In Article IV that during the period from September, 1941, into February, 1942, the plaintiffs were the owners of certain articles of property stored in a locker at Seattle for the express purpose of being attached to and used in the outfitting and operation of said "Hull No. 20"; that on February 24, 1942, all of said articles so stored in Seattle were lost by fire, list thereof being attached as Exhibit B (R. 23-25);

In Article V that plaintiffs' loss amounted to $14,160.14, which the defendant had refused to pay.

By the defendant's "Request for Admissions under Rule 36" and the plaintiffs' "Response" thereto (R. 26-37) it was established and admitted of record:

(1) That the document attached to and exhibited with the defendant's request was "a true copy of the original agreement" dated May 14, 1941, between Hanney, one of the plaintiffs, and Petersen, a builder (dba Marine View Boat Building Co.), providing for the construction in the latter's yard at Brown's Point, Tacoma, of a vessel known as "*Hull No. 20*" upon certain specifications, calling for a purchase price of $30,000, and stipulating for the protection of builders' risk insurance (R. 30-35);

(2) That said agreement dated May 14, 1941,

between Hanney, one of the plaintiffs, and Petersen, the builder, was the agreement under which was constructed "*Hull No. 20,*" so designated both in said agreement itself and in the Builders' Risk Policy, identified in plaintiffs' amended complaint as Exhibit A, (R. 21, 22, 26, 29, 32);

(3) That full performance of said agreement (either by Hanney or by Petersen) did not require any of the property, lost by fire and described by plaintiffs' amended complaint in list identified as Exhibit B, to be acquired for or to be used in the construction of the vessel known as "*Hull No. 20,*" (R. 27, 29, 36, 37);

(4) That in the performance of said agreement and in the construction thereunder of the vessel known as "Hull No. 20" there was not used any property of the kind and description as listed, (R. 27, 28, 36).

The defendant's Second Amended Answer (R. 38, 39) to plaintiffs' Amended Complaint tacitly admitted all allegations of its first count excepting for denials made in the following language:

(1) "The defendant denies that the property listed and described by Exhibit B was covered in whole or in part by the insurance policy of which Exhibit A is a copy;

(2) "The defendant (in harmony with admissions made and filed in behalf of the plaintiffs herein) denies that the property listed and described by Exhibit B was in whole or in part property stored by the plaintiffs for the purpose of being attached to or used upon Halibut Boat Hull No. 20 in the building or construction thereof, or was property belonging to or destined for the building or construction of Halibut Boat Hull No. 20;

(3) "The defendant denies that the property listed and described by Exhibit B was at the time lost by fire of the value of $14,160.14;

(4) "The defendant denies that there is due or owing to the plaintiffs from the defendant the sum of $14,160.14 or any lesser sum." (R. 38, 39).

As already observed, the defendant's motion for summary judgment technically was based upon the record as existing in the District Court, which included two depositions—one by the witness Wheelock (R. 89-119) and one by the witness Stakset (R. 43-89). As to these, the deposition of Wheelock, a Seattle insurance agent, taken by the plaintiffs, was wholly favorable to the defendant concerning the coverage of the defendant's Builders' Risk Policy obtained through him; and the deposition of Stakset, taken by the defendant, was entirely confined to values—the amount of plaintiffs' loss or damages. However, although published before trial (R. 41) to permit examination, these depositions were not actually urged by the defendant in support of its motion in the lower court; and these depositions are not now stressed in support of the motion before this Court.

Furthermore, no affidavits (as allowed by Rule 56) were ever filed by the defendant or by the plaintiffs, either to win or to defeat the motion for summary judgment.

Hence, it appears that the defendant asks this Court to analyze the allegations of the first count of the plaintiffs' amended complaint, the admissions made by the plaintiffs in response to request therefor

under Rule 36, and the denials of the defendant's second amended answer; and then to join in the conclusion that when the motion for summary judgment under Rule 56 was submitted, "except as to the amount of damages, there (was) is no genuine issue as to any material fact"—in other words, that the record then presented only a question of law as to liability for decision by the court.

When the motion for summary judgment was interposed and decided there *could* have been "no genuine issue as to any material fact" except as raised by a denial of the defendant in its second amended answer to an allegation of the plaintiffs in the first count of their amended complaint.

What were the defendant's denials?

First, the defendant denied "that the property listed and described by Exhibit B was covered in whole or in part by the insurance policy of which Exhibit A is a copy" (R. 38).

That was not a denial of an allegation of a material fact. That was the negation of a proposition of law. And the denial in an answer of a conclusion of law improperly pleaded in a complaint raises "no genuine issue as to any material fact."

> "Conclusions of law do not call for a denial, and are not binding as admissions when not denied. A denial of a conclusion of law raises no issue * * *."
>
> 1 Bancroft's Code Pleading, Sec. 401, p. 591.

Second, the defendant denied "(in harmony with admissions made and filed in behalf of the plaintiffs herein) * * * that the property listed and described

by Exhibit B was in whole or in part property stored by the plaintiffs for the purpose of being attached to or used upon Halibut Boat Hull No. 20 in the building or construction thereof, or was property belonging to or destined for the building or construction of Halibut Boat Hull No. 20" (R. 38).

That denial raises "no genuine issue" because the factual allegations so denied by the defendant had been withdrawn, neutralized or superseded by the plaintiffs themselves in their admissions (R. 26-39) under Rule 36, by which they were bound and upon which the denial was based.

Third, the defendant denied "that the property listed and described by Exhibit B was at the time lost by fire of the value of $14,160.14" (R. 38, 39).

That denial was directed and limited solely "to the amount of damages." It was unrelated to the question of liability. That denial, while raising a genuine issue of material fact, was expressly excepted by Rule 56, which permitted the same and authorized a summary judgment notwithstanding.

Fourth, the defendant denied that there was "due or owing to the plaintiffs from the defendant the sum of $14,160.14 or any lesser sum" (R. 39).

That denial raises "no genuine issue as to any material fact" within the meaning of Rule 56, because primarily it was a denial of a conclusion of law, and because secondarily it was related to the "amount of damages."

Other than these several denials by the defendant there was none of record when the motion for sum-

mary judgment was submitted. Hence, there being "no genuine issue as to any material fact" other than "as to the amount of damages" the lower court was obligated to rule upon the question of law presented, and either to grant summary judgment of dismissal, or (if dismissal were denied) to restrict the trial to the question of the amount of damages.

2. No Insurance Coverage.

As to the principal question of substantive law arising from the merits of this case, it is the contention of the defendant that, when read in the light of the agreement of May 14, 1941, between Hanney, one of the plaintiffs, and Petersen, the boat builder, the defendant's Builders' Risk Policy plainly covered only the vessel known as "*Hull No. 20*" during construction together with the materials, etc. destined for and used in such construction at Tacoma, as contemplated by said agreement.

This is not the same contention urged by the defendant before this Court upon the former appeal taken by the plaintiffs in this case. Then the defendant argued to support the earlier ruling of the District Court that the policy within itself clearly showed its coverage was not extended to materials of plaintiffs in storage at Seattle.

Because this Court's earlier opinion (142 F.(2d) 864) has indicated that the policy alone left the scope of its coverage in "obscurity" and has invited clarification by interpretation flowing from the parties involved, the policy is returned on this appeal in company with the construction contract between such

parties in which and by whom the insurance was required as an important incident to the building of the vessel "designated as Hull No. 20."

This agreement (R. 30-35) dated May 14, 1941, was signed by Petersen, of Brown's Point, Tacoma, d.b.a. Marine View Boat Building Co., as *first party*, and Hanney, of Ketchikan, one of the plaintiffs, as *second party*, reciting that Hanney was desirous of having built for him a fishing vessel and that Petersen was engaged in the business of building such craft.

Aside from mere details and insignificant elements, the agreement provided:

> That the first party was to build a certain type of fishing boat "in accordance with plans and specifications to be drawn by first party" of customary construction for such type (similar to a certain completed vessel called the "Nordic Pride") the dimensions and characteristics being itemized.
>
> That the "*vessel shall be complete in all respects*" and shall be equipped with certain described engine, propeller, whistle, compressor, air tanks, propeller shaft, "other standard equipment, spare engine parts and tools."
>
> That "THE VESSEL HEREIN CONTEMPLATED SHALL BE KNOWN AND DESIGNATED AS HULL NO. 20 DURING ITS CONSTRUCTION."
>
> That keel for the vessel shall be laid immediately after a certain other vessel shall have been launched.
>
> That "the finished boat shall be delivered to second party at Astoria, Oregon, immediately

after completion * * * said trip to Astoria, Oregon, to constitute said vessel's trial trip."

That "the *first party* shall not be held liable to second party for * * * delay in delivery of materials or for accidents to said vessel during the course of construction."

That the "*first party* shall procure * * * in favor of second party * * * a bond issued by a reliable surety company in the sum of thirty thousand dollars ($30,000) * * * to be conditioned that first party will perform and fulfill the terms and conditions of this contract."

That the "FIRST PARTY SHALL PROCURE BUILDERS' RISK INSURANCE."

That the second party shall pay to the first party "for said vessel, complete with equipment and engine, the sum of thirty thousand dollars $30,000.00)" by installments, the last "after trial trip to Astoria, Oregon, and acceptance of vessel by second party at Astoria, Oregon."

That the "second party shall have the right and privilege of *selecting* the winches, toilet, sinks" and certain other listed items of equipment or fittings with a resulting limited variation, up or down, from the total contract price of $30,000.00.

As provided by this agreement signed on May 14, 1941, calling for the building of the vessel to be "known and designated as Hull No. 20 during construction," inferentially its keel was laid and work was begun as soon as the other vessel, mentioned therein, was off the ways and was launched. Also inferentially this was about August 20, 1941, when the Builders' Risk Policy was issued.

Of course this policy was analyzed and discussed

in behalf of the defendant by the "Brief of Appellee" upon the earlier appeal in this case (No. 10647). However, it was then inappropriate to mention its relation to the construction contract or to draw any interpretive aid therefrom.

Examination of this policy, being Exhibit A, (R. 10-22) shows as follows:

(1) That the policy named the assureds as "Peter Petersen d/b/a Marine View Boat Building Co., builder ,and Oluf B. Hanney, owner" (R. 17, 21, 22);

(2) That the policy identified and described the property insured

(a) on the outside cover (R. 21) as "Hull No. 20 (Being Built)";

(b) by the basic policy form (R. 18) as "Hull No. 20 (Being Built)";

(c) in the Builders' Risk Form of endorsement (R. 22) as "Hull No. 20, building at Brown's Point, Tacoma, Washington."

Hence, by examination of both the agreement of May 14, 1941, and the Builders' Risk Policy it appears that the parties to the construction contract were the assureds in the insurance contract, that the construction contract required the procurement of the insurance contract, that the insurance contract was issued in performance of the construction contract, and that both contracts were elements or parts of a single transaction. Again, by examination of both such instruments it appears the subject matter of both was identified and described by the same designation —"Hull No. 20"—a fairly arbitrary term doubtlessly chosen by Petersen, the builder, for convenience to

distinguish the proposed vessel from other like craft in more or less current construction by him; and also a term certainly employed in the Builders' Risk Policy only because it was supplied to the defendant by one of the assureds, either Petersen, the builder, or Hanney, one of the plaintiffs. Further, by such examination and by reference to the defendant's "Request for Admissions under Rule 36," in item "(2)-f" and the plaintiffs' "Response" thereto (R. 29, 36, 37) it appears that "Hull No. 20" in the agreement dated May 14, 1941, and "Hull No. 20" in the Builders' Risk Policy were identical. Finally, by such examination of the two interdependent documents and by reference to the several admissions of plaintiffs (R. 35-37) in "Response" to the defendant's "Request for Admissions under Rule 36" (R. 26-35), it appears that the property designed for use in the construction of "Hull No. 20" was the same as the property intended for protection by the insurance of "Hull No. 20."

But where does this conclusion lead? Directly, to the necessarily resulting conclusion that plaintiffs' property lost by fire while in storage at Seattle was not insured by the Builders' Risk Policy because such property was no part of "Hull No. 20" within the provisions or contemplation of the agreement dated May 14, 1941.

As demonstrated, the term "Hull No. 20" used in the policy was derived and adopted from the builder's contract. The policy did not define the term. But the builder's contract did; it said, "*the vessel herein contemplated shall be known and designated as Hull No. 20 during its construction*" (R. 32). And the builder's

contract further defined the term "Hull No. 20" by providing in substance that Petersen, the builder, was to draw the plans and specifications; determine and acquire the materials; deliver and assemble them at his plant in Tacoma; perform the necessary labor and make all the requisite installations—to the end that the "vessel shall be complete in all respects" (R. 32) and "the finished boat shall be delivered to (Hanney, one of plaintiffs) at Astoria, Oregon" (R. 32).

Within the definition of "Hull No. 20" as employed in the agreement of May 14, 1941, Hanney was obligated to do nothing except to pay money for the premiums on the performance bond and insurance policy and for the purchase price of the proposed vessel title to which was to pass from Petersen, the builder, on delivery and acceptance at Astoria, Oregon. In other words, the term "Hull No. 20" did not contemplate materials which Hanney was obligated to own or to supply for the construction of the completed or finished vessel.

However, it is true that the agreement of May 14, 1941, did contain a clause giving to Hanney the mere option of "*selecting*" (R. 34) certain limited specified items of installation such as "winches, toilet, sinks," etc. But none of these items covered by this option of selection were articles of property owned by the plaintiffs and destroyed in storage at Seattle, as listed in Exhibit B (R. 23-25).

Aside from the definition of "Hull No. 20" as embodied in the agreement of May 14, 1941, it otherwise appears inferentially therefrom that the property stored in Seattle was never intended to be protected

by the Builders' Risk Policy—not even by the plaintiffs, until after the fire loss. This fact outcrops from the values involved in the builder's contract, the insurance policy and the plaintiffs' claim of recovery.

The agreement of May 14, 1941, fixed the full purchase price for "Hull No. 20," as a completed vessel with all materials, installations and labor furnished by Petersen, the builder, at the sum of $30,000.00 (R. 33). This agreement required the builder's obligation on a performance bond in the sum of $30,000.00 (R. 33).

The Builders' Risk Policy was originally issued as of August 20, 1941, for the sum of $15,000 to run until November 20, 1941 (R. 18, 21, 22). On the expiration date it was extended until December 20, 1941, without increase in the amount of insurance (R. 16). On December 20, 1941, it was again extended until January 20, 1942, without increase in the amount of insurance (R. 15). Shortly thereafter, on December 23, 1941, an endorsement was added to the policy which recited that "the completed price of this hull and machinery is $30,000 and this policy is written in the amount of $15,000 valued at $30,000" (R. 13, 14). Then on January 20, 1942, the policy was extended for another period of thirty days and an endorsement change was made reading "that the valuation of the hull for insurance purposes is changed to read $15,000.00 with the amount of insurance carried $15,000.00" (R. 12, 13). Ultimately, in February, 1942, (doubtless because of the arrival and installation of the vessel's engine and machinery) there was attached to the policy an endorsement

change which raised the actual amount of insurance protection to the level of the full purchase price of "Hull No. 20" as fixed by the construction contract; this endorsement agreed "that the amount of insurance under this policy is increased to $30,000.00 valued at $30,000.00 * * * and is extended to cover machinery" (R. 11, 12).

These modifications in the provisions and figures specified by the successive policy endorsements as affecting the amount of protection, disclose that the assureds were observing the progress as to the construction on "Hull No. 20," were attempting to measure their insurance by the values at risk under the building contract, and were wanting full coverage for the final purchase price of $30,000.00 when "Hull No. 20" approached completion.

However, according to the plaintiffs' amended complaint from some day in September, 1941, until the 24th day of February, 1942, they at all times owned property stored in Seattle destined for use in the operation of the "Hull No. 20" when completed as a fishing craft which was worth $14,160.14 (R. 5). This property, listed in Exhibit B (R. 23-25), was outside of and in addition to the innumerable construction items to be supplied and assembled into the finished "Hull No. 20" by Petersen, the builder, under the agreement of May 14, 1941. The value of this property in Seattle storage was alone the practical equivalent of the amount of the insurance as originally issued on August 20, 1941, and as continued into February, 1942. The value of this property lost by

fire at Seattle, as asserted in plaintiffs' amended complaint (R. 5) was $14,160.14 in excess of the full purchase price of "Hull No. 20" and of the final amount of insurance to protect the same. Yet, notwithstanding, the plaintiffs claim the Builders' Risk Policy was intended by them to insure against the property consumed by the fire in Seattle.

As based on the values involved, there is another aspect to the contention of the plaintiffs that their Seattle fire damage was covered by the defendant's insurance obligation. The policy named as assured not only Hanney, one of the plaintiffs, but also Petersen, the builder, who was bound by the agreement of May 14, 1941, to perform to the extent of creating out of his materials and labor a vessel worth $30,000.00. Had some single disaster on the same date destroyed not only all of the plaintiffs' property in Seattle but also "Hull No. 20" at Tacoma, resulting in an aggregate loss of $44,160.14, could the plaintiffs be allowed any portion of the insurance recovery on account of property in which Petersen, the builder and a named assured, was not interested?

An additional fact weighs against the theory of plaintiffs' demand upon the Builders' Risk Policy. The materials, etc., contemplated by the agreement of May 14, 1941, were wholly items to be used in the *construction* of "Hull No. 20" as a finished vessel. The gear and equipment belonging to the plaintiffs and listed by Exhibit B were, with few possible exceptions, articles to be used in the *operation* of fishing with "Hull No. 20" after completion, delivery

and acceptance at Astoria, Oregon. And at that time and place the policy would have expired by its express positive terms, since it provided that "all trials shall be carried out within a distance by water of 100 nautical miles of the place of construction" and that "in no case shall this insurance extend beyond delivery of the vessel" (R. 22).

During argument to sustain the contention that the Builders' Risk Policy was neither obtained nor issued to insure the plaintiffs' property in storage at Seattle, this brief has largely confined discussion to the interpretive light cast upon the insurance contract by the construction agreement. However, the policy alone contains within itself strength to support the same contention, for which reason and without repetition, reference is made to the "Brief of Appellee" filed upon the earlier appeal (No. 10647).

3. Interest Allowance Excessive.

As a point of lesser importance the defendant has assigned as error allowance of interest by the District Court from February 24, 1942, the date of the fire loss, because the plaintiffs' demand was disputed in good faith not only as to liability but as to the amount which was unliquidated. That disagreement regarding the value of the property destroyed was warranted seems plain when the plaintiffs' claimed $14,-160.14 by their amended complaint and the verdict awarded only $7,200.00. These considerations prompt the defendant to urge that interest be granted only from November 10, 1944, the date of judgment—should the same be otherwise affirmed.

CONCLUSION

Patently, it is the principal prayer of the defendant to this Court that the lower court be reversed in this case and be directed to grant the motion for summary judgment of dismissal with costs.

Respectfully submitted,

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